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No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

CLARENCE E. PETEN
STAFF SERGEANT, UNITED STATES ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER, IN LIGHT OF *SKINNER v. RAILWAY LABOR EXECUTIVES' ASSOCIATION*, 489 U.S. ____, 109 S.CT. 1402 (1989) AND *NATIONAL TREASURY EMPLOYEES UNION v. VON RAAB*, 489 U.S. ____, 109 S.CT. 1384 (1989), THE ARMY'S MANDATORY URINALYSIS PROGRAM CONSTITUTES AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT WHERE EVIDENCE OBTAINED BY SUCH URINALYSES ROUTINELY IS USED IN CRIMINAL PROSECUTIONS.

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No. _____

CLARENCE E. PETEN
STAFF SERGEANT, UNITED STATES ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Clarence E. Peten, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The summary disposition by order of the Court of Military Appeals is reported at ____ M.J. ____ (C.M.A. 1990) (Appendix A). The decision of the United States Army Court of Military Review is an unpublished, short-form decision (ACMR 8802336 (A.C.M.R. 9 November 1989)) (Appendix B).

JURISDICTION

The decision of the Court of Military Appeals was rendered on May 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. V 1987).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment IV: The right of the people to be secure in their persons, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Uniform Code of Military Justice, article 112a, 10 U.S.C. § 912a (Supp. V 1987) [hereinafter UCMJ], provides:

> (a) Any person subject to this chapter who wrongfully uses . . . a substance described in subsection (b) shall be punished as a court-martial may direct.
>
> (b) The substance referred to in subsection (a) [include] the following:
>
> (1) . . . cocaine . . .

STATEMENT OF THE CASE

On October 17 and 18, 1988, petitioner was tried by a general court-martial, sitting with officer and enlisted members, at Fort Rucker, Alabama. Contrary to his pleas, petitioner was found guilty of absence without leave and wrongful use of cocaine, in violation of UCMJ articles 86 and 112a, 10 U.S.C. §§ 886 and 912a (1982 and Supp. V 1987), respectively. The jury members sentenced petitioner to a bad-conduct discharge, confinement for six months, and reduction in grade from staff sergeant to private.

The following facts gave rise to the charge alleging petitioner's wrongful use of cocaine. On February 24, 1988, petitioner and approximately 340 other soldiers were command directed to provide a urine specimen for drug abuse testing (Record of Trial [hereinafter R.] 141, 148).[1] Before the urine sample was provided, petitioner's identity was confirmed and his social security number and a pre-printed specimen number

[1] **Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 313** provides:

Inspections and inventories in the armed forces.

(a) General Rule. Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at

were annotated on a label which was affixed to a specimen bottle. Petitioner's rank, name, social security number, the julian date, flight status, and specimen number were annotated on a urinalysis testing log verified by petitioner's signature. Petitioner was also given the specimen bottle for verification, which he initialed (R. 259-60). Petitioner was then instructed to provide his urine to fill the bottle.

A male observer accompanied petitioner to the latrine where the observer directly witnessed petitioner urinate into the specimen bottle. The lid was placed on the bottle and it was returned to the soldier who was administratively processing the samples (R. 102). That soldier, in petitioner's presence, initialed the chain-of-custody document and placed petitioner's bottle in a urine specimen storage box; petitioner was then allowed to leave (R. 67-68).

Petitioner's sample was sent to and received by the Forensic Toxicology Drug Testing Laboratory at Fort Meade, Maryland, on March 4, 1988. Petitioner's urine sample was assigned an identification number (#309), which was placed on

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trial when relevant and not otherwise inadmissible under these rules.

(b) **Inspections**. An "inspection" is an examination of the whole or part of a unit, organization, installation . . . conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation. . . . An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. . . . *An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule.* Inspections shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. *Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected.* Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized. (Emphasis added)

the chain-of-custody document, bottle cap, and bottle (Prosecution Exhibit [hereinafter Pros. Exh.] 3 at 2). Urine sample #309 was tested and contained 16,000 nanograms per milliliter of cocaine metabolite and, therefore, was confirmed "positive" for the cocaine metabolite (Pros. Exh. 3 at 2). The results indicated that the soldier providing the urine sample (*i.e.*, petitioner) had ingested cocaine within 4-5 days prior to rendering the sample (Pros. Exh. 3 at 3).

Petitioner was subsequently tried and convicted. The Army Court of Military Review summarily affirmed the findings and sentence (Appendix B), and the Court of Military Appeals granted review of the following issue:

> WHETHER THE SEIZURE OF [PETITIONER'S] URINE AND THE SUBSEQUENT INTRODUCTION OF ITS ANALYSIS INTO EVIDENCE AGAINST HIM WAS UNREASONABLE AND VIOLATED THE FOURTH AMENDMENT OF THE CONSTITUTION.

Simultaneously with granting review, the Court of Military Appeals rendered its affirmance of petitioner's case by summary disposition (Appendix A).

REASONS FOR GRANTING THE WRIT

In *Skinner v. Railway Labor Executives' Association*, 489 U.S. ____, 109 S.Ct. 1402 (1989) [hereinafter *Skinner*], and *National Treasury Employees Union v. Von Raab*, 489 U.S. ____, 109 S.Ct. 1384 (1989) [hereinafter *Von Raab*], this Court held that in certain instances random drug testing by urinalysis is a reasonable search under the Fourth Amendment. In *Skinner*, the Court stated:

> [t]he Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, likewise presents "*special needs*" *beyond normal law enforcement* that must justify departures from the usual warrant and probable-cause requirements.

Skinner, 109 S.Ct. at 1414 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)) (emphasis added). The Army, with regu-

lar and consistent frequency, uses the results of mandatory urinalysis inspections as a basis for criminal prosecution.[2] Thus, the question unanswered by this Court in *Skinner* is presented for review in petitioner's case.[3]

In response to the problem of illegal drug use, the Army and other military services and governmental agencies have implemented urinalysis programs to detect illegal drug users.[4] The detection of illegal drug users is a commendable goal. Accordingly, it is not the goal that is questioned herein by petitioner, but rather the constitutionality of the method implemented to attain that goal. Justice Brennan warned, "[m]oved by whatever momentary evil has aroused their fears, officials – perhaps even supported by a majority of citizens – may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil." *New Jersey v. T.L.O.*, 469 U.S. 325, 361 (1985) (Brennan, J. concurring in part, dissenting in part). Commenting on the protections provided by the Fourth Amendment, Justice Stewart similarly cautioned that, "[i]n times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appeal unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). Today, an "evil" facing society and the military is drug abuse, but the protections of the Fourth Amendment are being placed in jeopardy by the efforts being used to combat that problem.

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[2] Available data at the Army Defense Appellate Division indicates that of the 125 drug use cases reviewed in 1989, 70 were based solely on a random unit urinalysis.

[3] "We leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the Agency's program." *Skinner*, 109 S.Ct. at 1415 n.5.

[4] The Army's program is detailed in Army Regulation 600-85, Personnel – General: Alcohol and Drug Abuse Prevention and Control Program (21 Oct. 1988) [hereinafter AR 600-85].

This Court has frequently reaffirmed the principle that members of the armed forces enjoy the constitutional benefits of the Bill of Rights unless any given protection is, expressly or by necessary implication, inapplicable. "[T]he different character of the military community and of the military mission [may] require a different application of those protections." *Parker v. Levy*, 417 U.S. 733, 758 (1974). However, as the Court of Military Appeals noted in *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981), "[n]either this Court nor the Supreme Court has ever held that the Fourth Amendment does not shield the American service person. Indeed, the opposite is true." *Id.* at 126-27 (quoting *United States v. Ezell*, 6 M.J. 307, 313 (C.M.A. 1979)).

The essential purpose of the Fourth Amendment is to "impose a standard of reasonableness upon the exercise of discretion by government officials" in order to "safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). "The Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . .'" *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963). Generally, "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted). Petitioner submits that no exception recognized by this Court applies in his case.

I. THE SEIZURE AND TESTING (SEARCH) OF PETITIONER'S URINE WAS UNREASONABLE BECAUSE ROUTINE USE OF THE TEST RESULTS IN CRIMINAL PROSECUTIONS RENDERS THE "SPECIAL NEEDS" EXCEPTION INAPPLICABLE.

In petitioner's situation, the expectation of privacy at issue involves one of the most basic privacy interests known. A

person maintains one of the highest expectations of privacy in his own bodily functions and fluids. "One's anatomy is draped with constitutional protection." *United States v. Afandor*, 567 F.2d 1325, 1331 (5th Cir. 1978). This was recognized by the Circuit Court of Appeals in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987):

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observations; indeed, its performance in public is generally prohibited by law as well as social custom.

This Court has held that the taking of urine is a search under the Fourth Amendment. *Skinner*, 109 S.Ct. at 1414; *Von Raab*, 109 S.Ct. at 1390. Thus, a mandatory urinalysis testing program is subject to restrictions and limitations mandated by the Fourth Amendment.

In *Skinner* and *Von Raab* this Court upheld random urinalysis inspections for United States Customs Service employees seeking a job directly involved in the interdiction of drugs or requiring the employee to carry a weapon, and for railroad employees who are involved in an accident. To dispense with the warrant and probable cause requirements in urinalysis inspections, being justified as "administrative" programs, "some special needs beyond normal law enforcement" must be present. *Skinner*, 109 S.Ct. at 1414; *see Griffin v. Wisconsin*, 483 U.S. at 873 (search of probationer's home); *New York v. Burger*, 482 U.S. 691, 699-703 (1987) (search of premises of certain highly regulated businesses); *O'Connor v. Ortega*, 480 U.S. 709, 721-25 (1987) (work-related searches of employees' desks and offices); *New Jersey v. T.L.O.* 469 U.S. at 337-42 (search of student's property by school officials); *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) (body cavity searches of prison inmates). The Court reasoned that the seizure and search of the urine did not require a warrant or probable cause because the Government's interest

went beyond the normal needs for law enforcement. The Court opined: "[w]hen faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements." *Skinner*, 109 S.Ct. at 1414; *Von Raab*, 109 S.Ct. at 1390.

A. Lawfulness of the Army Urinalysis Program Prior to *Skinner* and *Von Raab*.

Military inspections are predicated on the commander's inherent power to inspect his organization to determine its ability to perform its mission. *United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965). Such inspections have been experienced by generations of Americans serving in the armed forces. "Thus, the image is familiar of a soldier standing rigidly at attention at the foot of his bunk while his commander sternly inspects him, his uniform, his locker, and his personal and professional belongings." *United States v. Middleton*, 10 M.J. at 127. As the Court of Military Appeals has aptly noted, inspections are part of the "disciplinary cost" to be paid by a soldier in order to shoulder his "readiness" burden. *United States v. Wetzel*, 7 M.J. 95, 97 (C.M.A. 1979) (Fletcher, C.J., concurring); *see also United States v. Fagan*, 28 M.J. 64 (C.M.A. 1989); *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Middleton*, 10 M.J. 123. However, with the advent of heightened drug abuse awareness and advances in the technology to discover drug use, the traditional military inspection has shifted to include whether illegal drugs are being used by servicemembers.

The constitutionality of the Army's urinalysis testing was initially challenged by a class action suit filed by soldiers serving in Europe. *See Committee for G.I. Rights v. Callaway*, 370 F. Supp. 934 (1974), *rev'd*, 518 F.2d 466 (D.C. Cir. 1975). The district court held that the warrantless drug inspections without a showing of probable cause were not justified by military necessity. The use of the information gained by the searches as a basis for imposing punitive sanctions, including

a less than honorable discharge, violated the soldiers' rights under the Fourth Amendment. The court allowed the Army to conduct drug inspections without probable cause, if the results were not used as a basis for any punitive action.

The Army appealed, and the Court of Appeals reversed, holding that "the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside of it." *Committee For G.I. Rights v. Callaway*, 518 F.2d at 475 (quoting *Parker v. Levy*, 417 U.S. at 758). The Court of Appeals after conducting a balancing test, found that the drug testing was reasonable based upon:

> (1) The increased "drug abuse in the Armed Forces [which] poses a substantial threat to the readiness and efficiency of our military forces";
>
> (2) "the expectation of privacy is different in the military";
>
> (3) "the primary purpose of the drug inspections is to ferret out illegal drugs as a means of protecting the health of the unit and assuring its fitness to accomplish its mission . . . *punitive actions . . . are incidental*"; and
>
> (4) ". . . the Army has attempted to guard the dignity and privacy of the soldier. . . ."

Id. at 476-77 (emphasis added). The court factored criminal prosecutions into its analysis, but felt that "incidental" punitive actions did not override an otherwise justifiable program.

In *Murray v. Haldeman*, 16 M.J. 74, the Court of Military Appeals, relying upon the Court of Appeals decision in *Committee for G.I. Rights v. Callaway*, held that the military's urinalysis program was reasonable in light of the unique conditions that exist in the military. *See also United States v. Middleton*, 10 M.J. at 127 ("in considering what expectation of privacy a service member may reasonably entertain concerning military inspections, we must recognize that such inspec-

tions are time-honored and go back to the earliest days of the organized military"); *United States v. Roberts*, 2 M.J. 31, 36 (C.M.A. 1976) ("the traditional military inspection which looks at the overall fitness of a unit to perform its military mission is a permissible deviation from what may be tolerated in civilian society generally.").

B. The Army Urinalysis Program in Light of *Skinner* and *Von Raab*.

Petitioner submits that the exception used to justify urinalysis inspections in other settings, as expressed by the Court in *Skinner* and *Von Raab*, is inapplicable to the Army's urinalysis program. The results of the Army's inspections are routinely turned over to law enforcement officials. Soldiers whose urine samples test positive for the presence of drugs are, with regular frequency, criminally prosecuted and punished. Furthermore, Military Rule of Evidence 313, amended in response to *Murray v. Haldeman*,[5] specifically authorizes the urinalysis program, purportedly as a valid health and welfare inspection. Nevertheless, actual implementation of the program impugns the administrative nature of the test.

To illustrate, the Army Court of Military Review has held:

> Mil. R. Evid. 313(a) contemplates that in some cases, criminal proceedings will arise out of the conduct of random unit inspections. Correspondingly, the officials directing and conducting such inspections contemplate the possibilities of criminal proceedings within the system of military justice to adjudicate some of the offenses discovered in the course of such inspections.

United States v. Turner, 30 M.J. 984, 986 (A.C.M.R. 1990) (footnote omitted). The Army court has also held that: "Mixed [administrative and criminal] purposes are clearly recognized through the use of the primary purpose language [in Rule 313]. No particular purpose is automatically the primary one when several purposes are involved." *United States v.*

[5] *See* the analysis (legislative history) of Rule 313, Manual for Courts-Martial, United States, 1984, Appendix 22, at A22-22.

Rodriguez, 23 M.J. 896, 899 (A.C.M.R. 1987). Significantly, the employees in *Skinner* and *Von Raab* were not criminally punished as a result of the urinalysis inspection. All the special needs cases decided by this Court involved inspections taking place outside the context of criminal investigations.

The Superior Court of Pennsylvania in *Commonwealth v. Danforth*, No. 01693, (Pa. Super. Ct. June 14, 1990) (*en banc*) (LEXIS, States library, PA file) recently analyzed the application of *Skinner* and *Von Raab* in a criminal context. That court held that a blood test administered pursuant to Section 1547(a)(2) of the Pennsylvania Motor Vehicle Code [6] was unconstitutional because the police officer lacked probable cause to believe the driver of the vehicle was under the influence. The court held that the "blood, breath and urine tests in question are full scale searches directly impacting on the individual's privacy and unreasonable because they are authorized absent any individualized suspicion." LEXIS at *16.

The Pennsylvania court cited *Skinner* and *Von Raab* for the proposition that "the probable-cause standard is peculiarly related to criminal investigations," and refused to substitute a "special needs" exception. *Id.* The court reasoned that because the stakes are so high in a criminal prosecution, the rights provided individuals by the Fourth Amendment must be protected. Petitioner submits that the Pennsylvania court's analysis is readily adaptable to his case, as the Army routinely uses its unit urinalysis inspections to ferret out and prosecute drug abusers.

In his dissent in *Skinner*, Justice Marshall uses the possibility of criminal prosecutions as an argument for removing the urinalysis program from the "special needs" exception.[7] "[T]he majority's refusal to restrict the release of

[6] This section authorizes the seizure and search of an individual's breath, blood, or urine based solely on the fact that he or she was driving a vehicle which was involved in an accident in which death or injury occurred.

[7] Army Regulation 600-85 does not limit the use of urinalysis results. Specifically, AR 600-85 para. 1-11(b) provides "Soldiers identified as illegal drug abusers may be considered for disciplinary actions under the UCMJ in addition to separation actions."

test results casts considerable doubt on the conceptual basis of its decision – that the 'special needs' of railway safety is one 'beyond the normal need for law enforcement.' " *Skinner*, 109 S.Ct. at 1431.

As indicated by the number of convictions for drug abusers based solely upon a unit urinalysis noted above, it is evident that the Army uses unit urinalysis inspections to ferret out and prosecute drug abusers. Recently, the Army Court of Military Review upheld a conviction for obstruction of justice based upon the submission of toilet bowl water instead of urine. In doing so, the Army court defined the urinalysis program as "an official act, inquiry, investigation, or *other criminal proceeding* with a view to possible disposition within the administration of justice of the armed forces." *United States v. Turner*, 30 M.J. at 985 (emphasis added) (quoting *United States v. Gray*, 28 M.J. 858, 861 (A.C.M.R. 1989)). It is inconsistent for the Army to define a urinalysis inspection as a criminal proceeding in support of a conviction for obstruction of justice and define it as an administrative inspection to support the argument that the probable cause and warrant requirements of the Fourth Amendment are inapplicable. *See also United States v. Rodriguez*, 23 M.J. at 899 n.5 ("As a practical matter, a commander who does not recognize the possibility of disciplinary actions arising from a positive urinalysis test is either naive or is engaging in deliberate ignorance.").

II. THE SEIZURE AND SEARCH OF PETITIONER'S URINE WAS UNREASONABLE UNDER THE BALANCING TEST APPLIED IN *SKINNER* AND *VON RAAB*.

To assert that the Army's mandatory urinalysis inspections are purely nonintrusive, administrative searches is incorrect. As discussed above, the Army criminally prosecutes based upon evidence gathered during urinalysis inspections. Moreover, the Army's program fails the reasonableness test of *Skinner* and *Von Raab*.

In *Skinner* and *Von Raab*, this Court applied a reasonableness standard, balancing the governmental interests involved

with the intrusion to individual privacy. This Court opined: "[w]hat is reasonable, of course, 'depends on all circumstances surrounding the search or seizure and the nature of the search or seizure itself'." *Skinner*, 109 S.Ct. at 1414 (quoting *United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985)); *Von Raab* 109 S.Ct. at 1390. This Court also relied upon the fact that "[b]oth the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations. . . ." *Skinner*, 109 S.Ct. at 1415. The privacy afforded an individual during the test was also a concern (*Skinner*, 109 S.Ct. at 1405; *Von Raab*, 109 S.Ct. at 1388), as was the confidentiality of the test results (*Skinner*, 109 S.Ct. 1415 n.5; *Von Raab* 109 S.Ct. at 1390).

The following is an application of the reasonableness standards in *Skinner* and *Von Raab* to petitioner's case.

Scope and Manner

Unlike the urinalysis programs approved by this Court in *Skinner* and *Von Raab* (and by the Third Circuit Court of Appeals in *Shoemaker v. Handel*,[8] by the District of Columbia Circuit Court of Appeals in *Harmon v. Thornburgh*,[9] by the Seventh Circuit Court of Appeals in *Schaill v. Tippecanoe County School Corp.*,[10] and by the Eighth Circuit Court of Appeals in *Rushton v. Nebraska Public Power Dist.* [11]), soldiers are usually given no notice of the urinalysis, soldiers must be visually observed while urinating,[12] soldiers are as a routine part of the program not given the opportunity to question a positive result, and positive results are regularly used in disciplinary actions. These drug inspections, made in

[8] 795 F.2d 1136 (3rd Cir. 1986), *cert. denied*, 479 U.S. 986 (1986).

[9] 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 865 (1989).

[10] 864 F.2d 1309 (7th Cir. 1988).

[11] 844 F.2d 562 (8th Cir. 1988).

[12] Army Regulation 600-85 para. 10-3(a) provides in part: "Soldiers must be directly observed when providing urine specimens. . . ."

a most intrusive manner solely to ferret out drug abusers, are not analogous to the Army's traditional preparedness inspections. *See e.g., United States v. Grace*, 19 U.S.C.M.A. 409, 42 C.M.R. 11 (1970); *United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458.

Direct observation is not required in civilian drug-testing programs, unless there is reason to believe that a particular individual to be tested may substitute a fraudulent urine specimen (*see* Exec. Order No. 12,564, sec. 4(c), 51 Fed.Reg. 32,889 (1986)). The military's only limitation on its visual observation is that it be conducted reasonably. However, the Court of Military Appeals has held that the requirement that females in the Navy disrobe from the waist down, sit on a toilet, and urinate into a collection bottle *while being observed from a distance of approximately 18 inches*, was reasonable. *Unger v. Ziemniak*, 27 M.J. 349. The court did note that "[i]f the eyes of the observer are too close to the genitalia of the person giving the urine specimen, the process of obtaining this specimen would be unduly humiliating and degrading. . . ." *Id.* at 358.

Petitioner submits that the intrusiveness of the search, both in its manner (*i.e.*, lack of privacy) and scope (*i.e.*, results used in criminal prosecutions), takes the Army's procedure out of the narrow exemption from traditional Fourth Amendment restrictions that has been carved out for legitimate urinalysis inspections.[13]

[13] Justice Marshall argued in his dissent in *Skinner*:

> I find nothing minimal about the intrusion on individual liberty that occurs whenever the Government forcibly draws and analyzes a person's blood and urine. Several aspects of the FRA's testing program exacerbate the intrusiveness of these procedures. Most strikingly, the agency's regulations not only do not forbid, but in fact, appear to invite criminal prosecutors to obtain the blood and urine samples drawn by the FRA and use them as the basis of criminal investigations and trials.

109 S.Ct. at 1431.

Justification

As justification for the imposition of compulsory urinalyses, the Government will likely proffer the increased drug abuse in the military and the hard stance society in general has taken and must take against drug abusers. Whatever the evil, however, violation of the Constitution by the Government is never justified. While "random drug testing might deter drug use, the fundamental values of individual liberty and privacy embodied in the Fourth Amendment cannot be sacrificed for the sake of mere efficiency." *National Treasury Employees Union v. Lyng*, 706 F. Supp. 934, 948 (D.C. Cir. 1988).

Place

Urinalysis samples are collected from soldiers in a latrine under the direct observation of a drug monitor who is in a position to view the soldier's private anatomy. *Compare with* Exec. Order No. 12,564, sec. 4(c), 51 Fed. Reg. 32,889 (allows individual privacy during urine collection "unless the governmental agency has reason to believe that a particular individual may alter or substitute the specimen to be provided."). This is a very important distinction between the Army's urinalysis program and the urinalysis programs evaluated by this Court in *Skinner* and *Von Raab*. "[A]lthough urine tests require employees to perform an excretory function traditionally shielded by great privacy, the regulations reduce the intrusiveness of the collection process by requiring that samples be furnished in a medical environment without direct observation." *Skinner*, 109 S.Ct. at 1406. "[T]he employee may produce the sample behind a partition, or in the privacy of a bathroom stall if he so chooses." *Von Raab*, 109 S.Ct. at 1388.

Voluntariness

Army tests are mandatory. Unlike the student athlete who refuses to submit a urine sample,[14] a soldier refusing to give a

[14] "Refusal to submit [urine sample] will not result in loss of employment, criminal penalties or any academic penalty whatsoever. No student will be

urine specimen may be punished under the Uniform Code of Military Justice for disobeying the commanding officer's order to provide the sample. If that offense is referred to a general court-martial and a conviction results, the soldier may receive a punitive discharge and up to five years confinement. *See Unger v. Ziemniak*, 27 M.J. 349. In addition, forcing a servicemember, who is unable to provide a urine sample, to drink fluids has been held reasonable. *See United States v. Mitchell*, 16 M.J. 654 (N.M.C.M.R. 1983). A conviction for obstruction of justice has been upheld for substituting toilet bowl water in place of urine. *United States v. Turner*, 30 M.J. 984. In sum, a soldier has no choice but to submit a urine sample or suffer some form of punishment.

Nature of Search

While the Fourth Amendment protects against invasions for civil as well as criminal investigations (*O'Connor v. Ortega*, 480 U.S. 709, 714 (1987) (plurality opinion)), the need for protection against governmental intrusion increases if the investigation is either designed to enforce criminal laws or is likely to be used to bring criminal charges against the person investigated. "Warrantless, suspicionless searches involving merely civil, nonpunitive penalties would be more likely to pass muster than similar searches that had criminal consequences." *Schaill v. Tippecanoe County School Corp.*, 864 F.2d at 1318.

The Army is using an administrative scheme as a pretext to search without probable cause for evidence of criminal violations. A fundamental defect in the urinalysis program is that it authorizes searches intended solely to uncover evidence of criminal acts. In petitioner's case, the results of the inspection of his urine was the sole evidence used to obtain his criminal conviction for drug use. The military's use of urinalysis testing results for criminal actions sets its drug inspection program apart from other urinalysis programs

suspended or expelled from school." Schaill v. Tippecanoe County School Corp., 864 F.2d at 1319.

deemed necessary by this Court. *See and compare Skinner*, 109 S.Ct. 1402; *Von Raab*, 109 S.Ct. 1384; *compare also* Exec. Order No. 12,564 at sec. 7(b) (limits the use of urinalysis results by federal agencies to administrative actions).

Availability of Less Intrusive Measures

The Fourth Amendment does not proscribe all searches and seizures, only those that are unreasonable. *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Schmerber v. California*, 384 U.S. 757 (1966). What is reasonable "depends on all the circumstances surrounding the search or seizure itself." *United States v. Montoya De Hernandez*, 473 U.S. at 537. Petitioner submits that, while the Army has a legitimate interest in having its soldiers drug-free, the privacy interests in question outweigh that interest. The use of mandatory, highly intrusive urinalylsis programs is not the only method at the Army's disposal to combat illegal drug use.

The Army has a large drug suppression capability. In addition to its military police resources, the uniqueness of the military community lends itself to drug detection without resorting to mandatory unit urinalyses. Dean Wigmore described it best when he observed: "The soldier is in an environment where all weaknesses and excesses have an opportunity to betray themselves. He is carefully observed by his superiors -- more carefully than falls to the lot of any member of the ordinary civil community; and all his delinquencies and merits are recorded systematically. . . ." *United States v. Shields*, 40 C.M.R. 546, 548 (A.C.M.R. 1969) (quoting Wigmore on Evid., 3d.ed. § 59). The Army does not need to resort to such highly intrusive measures as are at issue, when less intrusive and equally effective measures can be devised.

Conclusion

The Army's urinalysis program fails constitutional scrutiny. First, the program does not fall within the "special

needs" exception as defined and set forth by this Court in *Skinner* and *Von Raab*. The Army uses urinalysis as a law enforcement tool and routinely uses urinalysis results as the sole basis to court-martial a soldier for wrongful drug use. Therefore, this Court's reasons for upholding the urinalysis programs in *Skinner* and *Von Raab* do not exist, and the Army's program is not supportable as a matter of law. Secondly, the Army's urinalysis program does not guard the dignity and privacy of soldiers. The Army demands direct visual observation of the soldiers' anatomy while urinating. This is most demeaning and undignified. The tests are involuntary and soldiers are given virtually no advance notice. Furthermore, as the program is established, soldiers cannot thereafter, as part of the inspection procedure, question the test results. The Army's urinalysis program is not reasonable or justified based solely on the argument that drugs are evil. The Army has less intrusive methods to ferret out drug abusers, and the Army can (and does) eliminate soldiers who have positive urinalysis results through other channels.

The military appellate courts have failed to address the important constitutional issues raised in petitioner's case. The Army Court of Military Review did not address the issue in petitioner's case, but that court has upheld the Army's urinalysis program in light of *Von Raab*. *United States v. Lizasuain*, 30 M.J. 543, 545 (A.C.M.R. 1990). The Court of Military Appeals also has chosen not to specifically address the issue in the instant case, and has deferred analyzing the impact of *Skinner* and *Von Raab* on its previous holding in *Murray v. Haldeman*. *See United States v. Whipple*, 28 M.J. 314, 316 n.5 (C.M.A. 1989). The Court of Military Appeals' decision to summarily affirm the lower court's summary affirmance in petitioner's case leaves little guidance for the military courts on this important constitutional issue affecting hundreds of thousands of persons in the armed forces.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 63923/AR
CMR Dkt. No. 8802336

UNITED STATES, APPELLEE

v.

CLARENCE E. PETEN (418-74-6316), APPELLANT

ORDER

On consideration of the petition for grant of review of the decision of the United States Army Court of Military Review, it is by the Court this 24th day of May, 1990.

ORDERED:

That said petition is hereby granted on Issue II as raised by appellate defense counsel; and

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (DOMINISSE)
Appellate Government Counsel (POTTER)

APPENDIX B

UNITED STATES ARMY COURT OF
MILITARY REVIEW

ACMR 8802336

UNITED STATES, APPELLEE

v.

STAFF SERGEANT CLARENCE E. PETEN, 418-74-6316,
UNITED STATES ARMY, APPELLANT

US Army Aviation Center and Fort Rucker
R. P. Scheff, Military Judge

Before
DEFORD, KANE, and WERNER
Appellate Military Judges

---

9 November 1989

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of Court

U.S. GOVERNMENT PRINTING OFFICE: 1990 - 273-019/62100

(2)

No. 90-302

Supreme Court, U.S.
FILED
SEP 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

CLARENCE E. PETEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a warrantless, suspicionless urinalysis test, performed as part of a military commander's inspection of his unit, violates the Fourth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-302

CLARENCE E. PETEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Military Appeals affirming petitioner's conviction (Pet. App. 1a) is not yet officially reported. The opinion of the Army Court of Military Review (Pet. App. 2a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on May 24, 1990. The petition for a writ of certiorari was filed on August 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Rucker in Alabama. He was convicted of being absent without leave (AWOL) for four days and wrongfully using cocaine, in violation of Articles 86 and 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 886 and 912a. He was sentenced to six months' imprisonment, a bad conduct discharge, and a reduction in rank. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence. Upon discretionary review, the Court of Military Appeals summarily affirmed.

1. On February 24, 1988, petitioner and other members of his unit [1] provided urine samples at Fort Rucker for a random urinalysis test. Tr. 61, 100, 131. Petitioner's commander ordered the testing, Tr. 148, which involved taking urine samples from 340 soldiers. Tr. 141. On February 29, the samples were tested for the presence of marijuana and cocaine at the Fort Rucker Alcohol and Drug Abuse Division.

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[1] Petitioner was assigned to the Aeromedical Center at Fort Rucker. The Center is the hospital at Fort Rucker, the Army's aviation center. Petitioner performed duties as a medical supply specialist. PX 7 para. 6. As such, he was responsible for supervising the receipt, stocking and management of medical supplies (medical equipment, surgical supplies, pharmaceuticals) at the hospital. See Army Reg. 611-201, Enlisted Career Management Fields and Military Occupational Specialties, para. 2-333 (Nov. 30, 1989) (describing the duties of a medical supply specialist). In addition, petitioner was trained in the use of the M-16A1 rifle, the standard rifle of the armed forces. PX 1 para. 9. Like other soldiers, petitioner could be assigned duties involving use of the M-16A1 and other weapons.

Tr. 171-172. Petitioner's sample tested positive for the presence of the cocaine metabolite, and it was sent to the Army Forensic Toxicology Drug Laboratory at Fort Meade, Maryland, for further testing. Tr. 173; PXs 2, 3. Tests at the Fort Meade Laboratory confirmed the presence of the cocaine metabolite in petitioner's urine. PX 3. Petitioner's urine contained 16,000 nanograms(ng)/ml of cocaine metabolite—far above the 150 ng/ml cut-off level for a positive test result. *Ibid.*

2. On April 15, 1988, petitioner failed to report for duty and remained absent without authority until April 19, 1988. PXs 4, 5.

3. The Army Court of Military Review affirmed in a per curiam opinion. Pet. App. 2a. The Court of Military Appeals granted review on the question whether the seizure of petitioner's urine and the admission into evidence at trial of the urinalysis test result violated the Fourth Amendment, and summarily affirmed. Pet. App. 1a; see Supplement to the Petition for Grant of Review 1.

ARGUMENT

Citing *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989), and *National Treasury Employees Union* v. *Von Raab*, 109 S. Ct. 1384 (1989), petitioner contends that the taking and testing of his urine, pursuant to the Army's drug testing program,[2] violated the Fourth Amendment. In par-

[2] The program is governed by Army Reg. 600-85, Personnel-General: Alcohol and Drug Abuse Prevention and Control Program (Dec. 1, 1981) (rev. effective Nov. 21, 1988) [hereinafter AR 600-85]. The regulation provides detailed guidance for collection and testing of urine specimens. Collection and handling of the samples is recorded on a chain of custody document, see PX 2, and only samples that are confirmed positive

ticular, petitioner argues that the Army's drug testing program is unconstitutional because the "Army uses urinalysis as a law enforcement tool and routinely uses urinalysis results as the sole basis to court-martial a soldier for wrongful drug use." Pet. 18. That claim does not warrant review by this Court.

1. Petitioner has waived any claim regarding the admission of his urine test result by failing to raise that issue at trial. Rule 311(d)(2), Mil. R. Evid., requires that an objection to the admission of evidence seized from the accused must be made prior to his submission of a plea, or else the objection is waived. Also, Mil. R. Evid. 313(b), which specifically addresses inspections, including urinalysis testing, provides that an inspection is not valid if its primary purpose is to obtain evidence "for use in a trial by court-martial or in other disciplinary proceedings." In this case, petitioner did not object to the admisison of his urine test result before entering his plea, Tr. 7-8, when the test result was offered at trial, Tr. 64, 66, 191, or at any other time. Nor did petitioner claim that the urine testing was a subterfuge for a test of his urine to be used at a court-martial or some other disciplinary proceeding.[3] Ac-

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for the presence of a drug by a Department of Defense certified laboratory using the gas chromatography/mass spectrometry test are reported as positive. See PX 3. The regulation also details the Army's drug and alcohol abuse rehabilitation program. Under the program, soldiers can refer themselves, or can be referred by their commanders, for treatment of drug or alcohol abuse. AR 600-85, chs. 3 and 4, at 15, 17. Admissions made during treatment or in order to obtain treatment may not be used as a basis for a court-martial. AR 600-85, ch. 6, § II "Limited Use Policy," at 29.

[3] Petitioner's defense at trial was that the testing procedures were flawed in that individuals may have purposely or

cordingly, petitioner has waived his Fourth Amendment claim, and specifically has waived any claim that the "inspection" was merely a pretext and that the taking and testing of his urine were actually done for criminal investigative purposes, which is the gravamen of his argument in this Court.

2. In any event, the decision below is correct. In *Skinner*, this Court upheld against a Fourth Amendment challenge regulations providing for the testing of railroad employees who violate certain safety rules. After concluding that the Fourth Amendment applied to the regulations, the Court began its analysis by noting that the principal concern of the Fourth Amendment is the reasonableness of the search or seizure. *Skinner*, 109 S. Ct. at 1414. Recognizing that ordinarily a warrant issued upon probable cause is required for a search or seizure to be reasonable, the Court noted that an exception to this rule exists when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Ibid.* In assessing whether such special needs justified the railroad regulations, the Court balanced the government's interest in testing against the privacy interests of the employees. The Court found a strong governmental interest in "regulating the conduct of railroad employees to ensure safety," *ibid.*, and noted that the purpose of the regulations was to "prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." *Id.* at 1415 (quoting 49 C.F.R. 219.1(a) (1987)). That "compelling" interest, the Court concluded, outweighed the privacy interests of employees

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accidentally switched petitioner's sample with another sample. Tr. 345-355.

whose expectations of privacy "are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." 109 S. Ct. at 1418.

In *Von Raab*, the Court reached the same conclusion regarding regulations providing for the testing of Customs Service employees seeking transfer or promotion to positions having a direct involvement in drug interdiction or requiring them to carry firearms. 109 S. Ct. at 1390. The Court held that the government had a compelling interest in ensuring that "front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment" and a similarly compelling interest in protecting the public from employees who may use deadly force. *Id.* at 1393. Those interests outweighed the privacy interests of employees who "reasonably should expect effective inquiry into their fitness and probity." *Id.* at 1394. The Court likened the privacy expectations of such employees to the expectations of "those who join our military or intelligence services [who] may not only be required to give what in other contexts might be viewed an extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions." *Id.* at 1393-1394.

The analysis in *Skinner* and *Von Rabb* makes it clear that the Army's drug testing program does not violate the Fourth Amendment. The program promotes the government's and public's compelling interest in ensuring that soldiers are fit to perform their mission "to fight or be ready to fight wars should the occasion arise." *Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). As the Court of Military Appeals has recognized in many cases, the unlawful use of drugs

by servicemembers poses unique and serious problems in the military. For example, in *United States* v. *Trottier*, 9 M.J. 337, 346 (C.M.A. 1980), the court stated that "[t]he need is overwhelming to be prepared to field at a moment's notice a fighting force of finely tuned, physically and mentally fit men and women—and satisfaction of that need is not compatible with indiscriminate use of debilitating drugs." In *United States* v. *Bickel*, 30 M.J. 277, 282-283 (C.M.A. 1990), the court upheld the Army's drug testing program in light of *Skinner* and *Von Raab*, and stated that:

> [S]ervicemembers who are under the influence of drugs often have the potential to do great harm to the military mission and to national security—as well as to other persons and their property. Admittedly, a pilot or a tank operator usually will have a greater potential for harm than a servicemember assigned to a desk job. However, even a servicemember performing far away from active military operations may be operating a computer which processes information vital for those operations. Moreover, in the event of an emergency, a servicemember with a very routine job may be called on short notice to perform a more typically "military" task; and his failure to be physically and mentally ready to perform that task may jeopardize national security at the hands of foreign enemies or terrorists.

Congress has expressed its concern about the dangers resulting from the use of controlled substances by servicemembers. In Article 112a of the UCMJ Congress has forbidden the use of controlled substances by military personnel, even though the "use" of drugs is not proscribed by the general federal law

governing the possession and distribution of controlled substances. In 1971, Congress directed the Service Secretaries to establish procedures to identify, treat, and rehabilitate drug and alcohol dependent persons in the Armed Forces. 10 U.S.C. 1090. Most recently, Congress reaffirmed its mandate that recruits be tested for drug and alcohol use and that those who test positive be processed for separation. 10 U.S.C. 978. This legislative judgment reflects appropriate concern about the adverse effect that drug use by servicemembers poses to the "security, military fitness, or good order and discipline of the unit." Mil. R. Evid. 313(b).[4]

The Army's drug testing program, which allows random unannounced urinalysis testing of soldiers,

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[4] As this Court noted in *Schlesinger* v. *Councilman*, 420 U.S. 738, 760 n.34 (1975):

> The seriousness of the problem is indicated by information presented before congressional committees to the effect that some 86,000 servicemen underwent some type of rehabilitation for drug abuse in fiscal years 1972 and 1973, and only 52% of these were able to return to duty after rehabilitation. * * * It is not surprising, in view of the nature and magnitude of the problem, that in *United States* v. *Beeker*, 18 U.S.C.M.A. 563, 565, 40 C.M.R. 275, 277 (1969), the Court of Military Appeals found that "use of marihuana and narcotics by military persons on or off a military base has special military significance" in light of the "disastrous effects" of these substances " 'on the health, morale and fitness for duty of persons in the armed forces.' "

More recent statistics show that drug abuse in the armed services has diminished significantly. See *Unger* v. *Ziemniak*, 27 M.J. 349, 357 n.16 (C.M.A. 1989) (noting a 90% reduction in drug use since 1982 and commenting that "though drug testing undoubtedly does not deserve sole credit for this improvement, we are convinced that it performed a significant role").

serves the government's vital interest in combating the "substantial threat [that drug abuse poses] to the readiness and efficiency of our military forces." *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975). It gives the commander vital information regarding the fitness of his unit. The need for such information is precisely the sort of "special need[] beyond the normal need for law enforcement" that justified the drug testing programs at issue in *Skinner* and *Von Raab*. See *Skinner*, 109 S. Ct. at 1414. Drug testing has consistently been upheld on that ground. See *Committee for GI Rights* v. *Callaway*, *supra*; *United States* v. *Bickel*, *supra*; *Unger* v. *Ziemniak*, 27 M.J. 349 (C.M.A. 1989); *Murray* v. *Haldeman*, 16 M.J. 74 (C.M.A. 1983).

Contrary to petitioner's contention, Pet. 10-12, the Army's special need for a drug testing program is not suspect on the ground that "the Army routinely uses its unit urinalysis inspections to ferret out and prosecute drug abusers." Pet. 11. In the first place, test results are not routinely or frequently used in criminal prosecutions. It is quite rare for a soldier to be criminally prosecuted following a positive test result. In the first three quarters of 1989, for example, the Army tested 718,845 urine samples as part of its drug testing program, and 16,407 samples tested positive for marijuana, cocaine, amphetamines, or other controlled substances.[5] During the same period, by petitioner's count, 70 drug-use court-martial cases "were based solely on a random unit urinalysis." Pet. 5 n.2. Thus, petitioner's contention is based on a premise that is not true.

---

[5] These statistics were provided by the United States Army Drug and Alcohol Operations Agency, the agency responsible for inspecting and supervising the Army drug testing program.

That random urinalysis test results are sometimes used in criminal prosecutions does not call into question the administrative purpose of the Army's program. The concern in a situation where test results are used in criminal prosecutions, as this Court stated in *Skinner*, is that an administrative testing program is a pretext for a criminal investigative search. 109 S. Ct. at 1415 n.5. As noted, that possibility is specifically mentioned in Mil. R. Evid. 313, the Rule that addresses the admissibility of random urinalysis test results. Servicemembers can claim that their test was a pretext, and military courts have not hesitated so to find in appropriate situations.[6] Petitioner's failure to assert such a claim at his trial is dispositive of his argument in this Court.[7]

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[6] See, *e.g.*, *United States* v. *Thatcher*, 28 M.J. 20 (C.M.A. 1989) (invalidating a room inspection on the basis that the inspection was a subterfuge for a search of a suspected thief's belongings); *United States* v. *Austin*, 21 M.J. 592 (A.C.M.R. 1985) (upholding the trial judge's determination that a random urinalysis was a subterfuge for a search of a soldier's urine). Significantly, once an accused makes a prima facie showing of subterfuge, the prosecution must establish by clear and convincing evidence that the search was a valid inspection. Mil. R. Evid. 313(b).

[7] To the extent that petitioner's argument is directed at the drug testing program generally, the aforementioned statistics rebut his claim that the program is aimed at acquiring evidence for use at courts-martial. In addressing a similar argument in *Bickel*, the Court of Military Appeals appropriately stated: "We might take a different view [of the constitutionality of the Army's drug testing program] if the drug testing were designed solely to obtain evidence for criminal prosecution; but, as we understand the military drug-testing program, that is not the case. A positive drug test may result in admonitions or adverse administrative action for a servicemember—rather than in criminal prosecution." *Bickel*, 30 M.J. at 285.

Petitioner grudgingly acknowledges, Pet. 18, 15, that the Army has an interest in combatting drug abuse by soldiers. He contends, however, that this interest does not outweigh the privacy interests of soldiers who, as part of the drug testing program, are required to provide urine samples under direct observation and without notice and who "as a routine part of the program [are] not given the opportunity to question a positive [test] result." Pet. 13.

Petitioner greatly overstates the privacy interests of soldiers. Regarding the privacy interest, though petitioner may find it "most demeaning and undignified," Pet. 18, to urinate in the presence of another soldier,[8] that requirement of the drug testing program is virtually no different from other routine and necessary invasions of the privacy of soldiers. Soldiers routinely are required to use communal showers. Their barracks rooms are subject to unannounced, thorough inspections. See *United States* v. *Middleton*, 10 M.J. 123, 127 (C.M.A. 1981) (noting that such inspections are "time-honored and go back to the earliest days of the organized militia"). Soldiers are required to undergo regular physical examinations. See 10 U.S.C. 1004; Army Reg. 40-501, Standards of Medical Fitness, para. 8-21c(7) (July 1, 1987). Thus, the daily lives of soldiers lack the incidents of privacy that are available to civilians, and soldiers are subject to discipline and direction

[8] AR 600-85 provides that "[s]oldiers must be directly observed when providing urine specimens * * *; however, they will be accorded maximum respect and concern for human dignity," and directs commanders to select observers who "possess sufficient maturity and integrity to ensure that urine specimens they observe being provided are not contaminated or altered in any way." AR 600-85 paras. 10-3a and 10-4e(2), at 41, 42.

from superior officers that "would be unacceptable in a civilian setting." *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983). In short, a soldier's life is subject to pervasive regulation, and although a civilian might find it demeaning to urinate in the presence of another, for the soldier this requirement is an insignificant intrusion. When balanced against the government's interest in a reliable drug testing program aimed at ensuring that soldiers are physically and mentally fit to perform their duties, this "invasion of privacy" is minimal.

Petitioner's objection that the random urinalysis tests are unannounced is beside the point. Regardless of whether the test is announced or unannounced, the intrusion into a soldier's privacy is identical, and the Fourth Amendment analysis is the same. Moreover, unannounced, though not unexpected,[9] tests are a necessary feature of the Army's drug testing program. The program is aimed at assessing a soldier's readiness to perform the Army's mission. Announced inspections would not give a clear picture of a unit's or soldier's readiness and, therefore, would frustrate the purpose of the program. Cf. *Skinner*, 109 S. Ct. at 1416 (noting that the warrant requirement does not apply in situations where obtaining a warrant frustrates the purpose of the search).

Finally, petitioner's assertion that soldiers are "not given the opportunity to question a positive [urinalysis test] result," Pet. 13, is not true. The implementing regulations specifically allow a soldier

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[9] As the Court of Military Appeals has stated: "The very detailed regulations and policies established by the armed services for drug testing not only provide notice but also reduce the occasion for arbitrariness and abuse of discretion." *Bickel*, 30 M.J. at 285.

to obtain a retest of his sample either at an Army laboratory or "at a forensic laboratory outside the DOD laboratory system at the service member's own expense." AR 600-85 para. 10-8b, at 44. Furthermore, either at an administrative hearing or at a court-martial, a soldier is permitted to call expert witnesses to impugn the test result. Indeed, the Court of Military Appeals has held that in a prosecution for the wrongful use of drugs based on the results of a urinalysis test result, the government must present expert testimony to explain the laboratory test results. *United States* v. *Murphy*, 23 M.J. 310 (C.M.A. 1987); *United States* v. *Harper*, 22 M.J. 157 (C.M.A. 1986).

In sum, the Army drug testing program is reasonable. The program advances government interests of the highest order under circumstances where the intrusion on individual expectations of privacy is minimal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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